

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

| | | |
|--|----------|--------------------------------|
| INDIAN RIVER SECRETARIAL ASSOCIATION, : | : | |
| DSEA/NEA, | : | |
| | : | Representation Petition |
| AND | : | |
| | : | <u>04-02-417</u> |
| INDIAN RIVER SCHOOL DISTRICT. | : | |

RE: CONFIDENTIAL SECRETARIES

Appearances

Jeffrey M. Taschner, Esq., General Counsel, DSEA
James D. Griffin, Esq., Griffin & Hackett, P.A., for the District

The Indian River School District (“District”) is a public school employer within the meaning of 14 Del.C. 4002(n).

The Indian River Secretarial Association, DSEA/NEA (“IRSA”), is an employee organization within the meaning of 14 Del.C. §4002(h) and the exclusive bargaining representative of public school employees within the meaning of 14 Del.C. §4002(i). IRSA represents the bargaining unit defined to include:

All Secretarial and Clerical Employees of the Indian River School District, exclusive of confidential employees and supervisory and administrative personnel.

On February 9, 2004, Delaware State Education Association (“DSEA”) filed a petition on behalf of the IRSA seeking clarification and identification of “confidential secretarial positions”.

The District responded by letter dated March 9, 2004:

The secretarial and clerical bargaining unit consists of the following positions:

- Administrative Secretary
- Financial Secretary
- Senior Secretary
- Secretary
- Clerk

The following positions are excluded from the secretarial and clerical bargaining unit:

- Confidential Secretary to the Superintendent (1)
- Confidential Secretary to the Assistant Superintendent (1)
- Confidential Secretary to the Personnel Director (2)

By letter dated April 2, 2004, the IRSA challenged whether the Confidential Secretary to the Assistant Superintendent and one of the two Confidential Secretaries to the Personnel Director were properly excluded from the bargaining unit, asserting these positions were not “confidential employees” within the meaning of 14 Del.C. §4002(f).

A hearing was held on June 17, 2004, at which time the parties were afforded full opportunity to present evidence and argument as to whether the two positions in question are confidential under the statutory definition. This decision results from the record created by the parties in this matter.

FACTS

The following facts are based on the record created by the parties.

The Indian River School District employs approximately 1,050 employees. The District’s employees (excluding Administrators) are organized and represented for purposes of collective bargaining into five bargaining units. These units include educational professionals; paraprofessionals; food service; custodial and maintenance; and secretarial and clerical employees. All five units are currently represented by the Indian River Education Association (“IREA”), an affiliate of the Delaware State Education Association and the National Education Association. Each bargaining unit has its own officers and elects a Vice President to the IREA.

Each bargaining unit negotiates a separate collective bargaining agreement with the District using its unique negotiating team.

There are approximately fifty seven secretarial and clerical employees in the bargaining unit represented by the IRSA. Currently, four secretarial positions are excluded from the bargaining unit because they are classified as “Confidential Secretaries”. Confidential Secretaries are paid according to the Administrative Secretary pay scale, the most highly compensated under the State of Delaware salary scale for secretarial/clerical employees of public school districts. The most recently hired Confidential Secretary received an increase of approximately \$1,000 on her base annual salary when she was hired into the confidential position a little over a year ago.

Three of the four Confidential Secretaries have existed and been excluded from the bargaining unit (under the “confidential” exclusion) since at least 1993. They are the Confidential Secretary to the Superintendent, the Confidential Secretary to the Assistant Superintendent, and one Confidential Secretary to the Personnel Director. A second Confidential Secretary to the Personnel Director position was created and posted as a vacant position in December, 2002. The position was filled by a bargaining unit employee in approximately April, 2003.

There is no dispute concerning the confidential status of the Confidential Secretary to the Superintendent. That position is responsible for attending and taking minutes at all meetings of the Board of Education, including its Executive Sessions wherein collective bargaining issues and negotiating strategies and positions are often discussed.

The Confidential Secretary to the Assistant Superintendent supports the Assistant Superintendent who is the Superintendent’s designee on all five District negotiating teams. Although the Assistant Superintendent attends all negotiating sessions, his Secretary does not accompany him; she is, however, responsible for transcribing his notes from the negotiating sessions. She does sometimes accompany the Assistant Superintendent to the strategic meetings of the District’s negotiating teams where she takes notes and follows-up as directed. She creates

and maintains files for each of the negotiations and is responsible for drafting, reviewing, and reading all correspondence (including e-mail) relating to each series of negotiations. The Confidential Secretary to the Assistant Superintendent is also responsible for attending and creating minutes from the meetings of the Board of Education when the Superintendent's Secretary is unavailable to do so. Additionally, the Confidential Secretary to the Assistant Superintendent is responsible for attending and transcribing the record of all student disciplinary hearings.

The District's Personnel Director is primarily responsible for providing administrative support for the District's teams in collective bargaining with each of the five bargaining units. The current Personnel Director has held his position for approximately two and a half years. At the time of his hire, the Personnel Office was staffed with two secretaries, of which one was classified as confidential. After analyzing the work load and effectiveness of the office operations, the Personnel Director successfully petitioned the Board of Education and a second confidential secretarial position was created in the Personnel Office based on demonstrated need.

Responsibility for collective bargaining functions is divided between the two confidential secretaries in the Personnel Office. One confidential secretary is responsible for collective bargaining functions which relate to the custodial and food service bargaining units; the second confidential secretary handles collective bargaining responsibilities related to the educational professional, paraprofessional and secretarial/clerical bargaining units. Job functions related to collective bargaining include: creating and managing negotiation files for each bargaining unit; preparing and handling all correspondence related to collective bargaining involving the assigned bargaining unit with the unions and members of the District's negotiating team; preparing summaries of negotiating sessions from the Personnel Director's notes; attending meetings of the District's negotiating teams to take notes and provide follow-up as directed; typing bargaining proposals; preparing data (including cost and language items) for consideration by the District's negotiating team; preparing documents for the Personnel Director to present to the Board of

Education to apprise them of the status of negotiations; and gathering data on contract language in other districts as directed. In addition to their collective bargaining responsibilities, the two confidential secretaries in the Personnel Office are also responsible for working in tandem with the third secretary to handle all of the customary employment related responsibilities of the Personnel Office.

The job functions and responsibilities are set forth in the Confidential Secretary Job Description, which was last revised on April 1, 2004. District Exhibit 1. Of the twenty four tasks and proficiencies listed in this document, two relate specifically to collective bargaining:

1. Provide assistance in the preparation and dissemination of information related to collective bargaining and employment contracts with the various employee associations. May be required to attend meetings and take minutes related to collective bargaining sessions.
2. Prepares correspondence related to negotiation sessions for distribution to negotiation team members, district legal counsel and members of the Board of Education.

ISSUE

Are the Confidential Secretary to the Assistant Superintendent and the Confidential Secretary to the Personnel Director “confidential employees” within the meaning of 19 Del.C. §4002(f)?

POSITIONS OF THE PARTIES

Indian River Secretarial Association:

The IRSA argues the PSERA’s confidential exclusion is narrowly defined to exclude only those positions that have the demonstrated capacity to unduly burden the employer’s ability to effectively collectively bargain. The information provided by the District is insufficient to support a determination that the Confidential Secretary to the Assistant Superintendent and the second Confidential Secretary to the Personnel Director meet this limited definition.

The IRSA argues the District failed to establish that four confidential positions are required to support the collective bargaining process and requests that PERB find that the second Confidential Secretary to the Personnel Director does not meet the statutory confidential exclusion and is, therefore, included in the existing bargaining unit.

District:

The District argues the statutory exclusion of confidential employees is not a quantitative test and does not require that confidential positions have responsibilities limited to those which involve collective bargaining. It argues that the four identified positions are justifiably defined as confidential to support the District's collective bargaining with five bargaining units covering its more than 1,000 employees.

OPINION

The test for "confidentiality" is defined in subsection 4002(f) of the Public School Employment Relations Act, 14 Del.C. Chapter 40, as amended in 1992:

"Confidential employee" means any employee whose essential job function and advanced knowledge about the issues involved in collective bargaining would make it unduly burdensome for the employer to negotiate effectively if the employee were a member of an appropriate bargaining unit.

In RE: Capital School District Benefits Specialist, Del. PERB, Rep. Pet. 94-09-103, II PERB 1175, 1179 (1995), the process for applying the statutory criteria was outlined:

The determination of confidentiality is dependent upon the specific fact pattern in each case which is presented for resolution. In determining confidential status, the facts of each case must be examined to determine for whom the employee works, what that employee does and what knowledge and/or exposure the employee has to issues involved in collective bargaining. Finally a determination must be made as to whether, based upon the essential job functions and advanced knowledge regarding collective bargaining, the inclusion of the position within a bargaining unit compromise the employer's negotiating positions and make it unduly burdensome for the employer to effectively negotiate.

At the beginning of the hearing, the District was instructed that it had the burden of providing persuasive evidence that the positions of Confidential Secretary to the Assistant Superintendent and Confidential Secretary to the Personnel Director meet the test for exclusion under 14 Del.C. §4002(f). The Assistant Superintendent and the Personnel Director were credible witnesses and their testimony and documentary evidence were sufficient to persuade me that the exclusion of all four positions is justified by application of the statutory definition.

The Association argued that the collective bargaining responsibilities which define these four positions as “confidential” could be divided between the historical three confidential positions and that the District is required to prove that the responsibilities have expanded or changed such that the fourth position is now justified. The Association argued that either the Confidential Secretary to the Personnel Director or the Confidential Secretary to the Assistant Superintendent could be eliminated without detriment to the District’s ability to effectively negotiate.

The required analysis is not as simplistic and quantitatively standard as the Association argues. The addition of the fourth confidential position was based on a determination of need as prepared and presented by the Personnel Director and accepted by the Board of Education. The record is sufficient in this case to support the conclusion that the current organizational structure of the administrative branch of the Indian River School District, particularly as it relates to its collective bargaining relationships with five bargaining units of employees and a total staff compliment of more than 1,000 employees, requires the support of four confidential positions. The Association’s argument that the District was not limited in its ability to negotiate effectively in the past when there were only three confidential positions, without more substantive support of this position, was simply not convincing when juxtaposed with the District’s unchallenged evidence establishing the scope of the confidential secretaries’ job functions related to collective bargaining. There can be no reasonable dispute that the collective bargaining job functions described by the District’s witnesses meet the test of being essential and directly related to the

District's ability to effectively negotiate. Arguing that these functions might be organized in an alternative manner, without requiring that the challenging party establish that the current configuration is in some way "unreasonable" would create the opportunity for an arbitrary decision.

This determination should not be interpreted to suggest that a public school employer has an unfettered right to create unlimited confidential positions, simply by distributing job functions which touch upon collective bargaining widely among bargaining units employees. The General Assembly clearly and unambiguously stated its intent in adopting the specific definition of a confidential employee in the synopsis to the 1992 bill:

In Board of Education of the Capital School District v. Capital Educational Secretaries, DSEA/NEA (Del. PERB, Rep. Pet. No. 90-10-056) the Public Employment Relations Board held that by adding the work "process" to the term "collective bargaining", the General Assembly intended section 4002(f) to include issues that related to matters beyond collective bargaining negotiations. The amended language is intended to limit the definition of "confidential employees" to any employee who has an essential job function or knowledge in connection with issues involved in the collective negotiations process. It also emphasizes that the reason for excluding confidential employees is to preserve the negotiating balance between Employer and the Exclusive Bargaining Representative and to assure the understanding that employees simply processing personnel information or typing daily records or forms are not excluded as confidential.

PERB has consistently held that the statute is premised upon a broad construction of a public employee's right to representation as part of a collective bargaining unit, and that right is very specifically limited to exclude only those employees who fall within the statutory exclusion of "confidential employees".

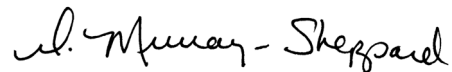
Finally, the determination reached in this decision is specifically based upon the record created by these parties at this time. The structural changes in the manner in which the District organized its collective bargaining responsibilities following the hiring of a new Personnel Director two and a half years ago supported the addition of a fourth confidential secretary. Changes in technology, administrative personnel, and/or the manner in which these parties choose

to engage in their collective negotiations could lead to a different result on this same question at some future point in time.

DECISION

For the reasons set forth herein, it is determined that the Secretary to the Assistant Superintendent and the two Confidential Secretaries in the Office of the Personnel Director are confidential employees within the meaning of 14 Del.C. §4002(f), and are, therefore, properly excluded from the bargaining unit, based upon the present configuration of their responsibilities.

IT IS SO ORDERED.

A handwritten signature in cursive script, reading "D. Murray-Sheppard", is written over a horizontal line.

DEBORAH L. MURRAY-SHEPPARD
Hearing Officer/Principal Assistant
Delaware Public Employment Relations Bd.

DATED: 30 July 2004